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MICHAEL RODAK, JR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1283

PAULA POE, RITA ROE, NANCY COE, PATRICIA NOE, PAMELA HARRIS, DR. LYNN P. CARMICHAEL, and all others similarly situated, *Appellants,*

v.

RICHARD E. GERSTEIN, WILSON T. SOWDER, ROBERT L. SHEVIN, their agents, those acting in concert with them, and all others similarly situated, *Appellees.*

On Appeal From the United States District Court for the Southern District of Florida

JURISDICTIONAL STATEMENT

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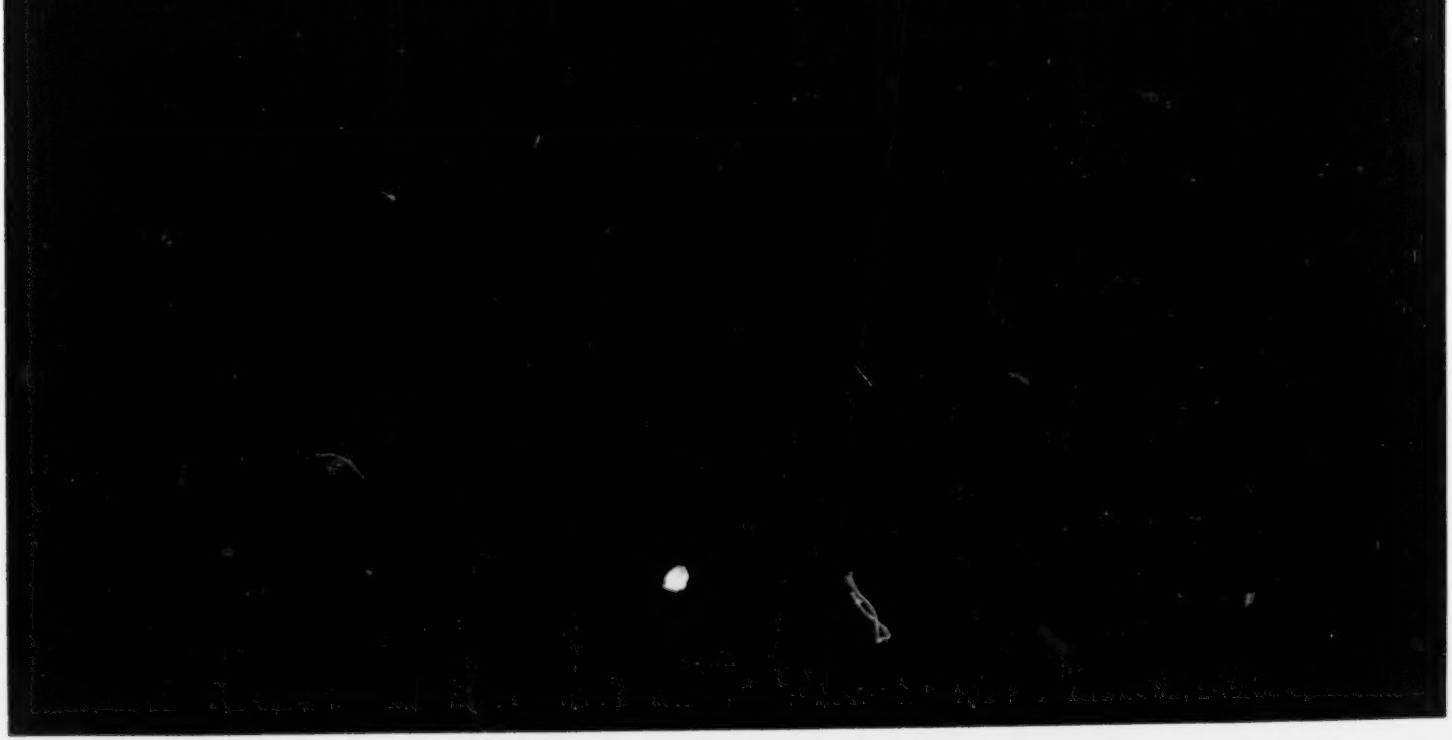

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-

PAULA POE, RITA ROE, NANCY COE, PATRICIA NOE, PAMELA HARRIS, DR. LYNN P. CARMICHAEL, and all others similarly situated, *Appellants*,

v.

RICHARD E. GERSTEIN, WILSON T. SOWDER, ROBERT L. SHEVIN, their agents, those acting in concert with them, and all others similarly situated, *Appellees*.

On Appeal From the United States District Court for the Southern District of Florida

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JURISDICTIONAL STATEMENT

Appellants bring this direct appeal from the final judgment entered October 29, 1973, by a statutory three-judge United States District Court for the Southern District of Florida, denying Appellee's Petition

for Rehearing of the decision rendered August 14, 1973, as amended August 23, 1973. The judgment appealed from declared unconstitutional in light of *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973), certain provisions of the Florida Abortion Law of a nature not involved in *Roe* and *Doe*. However, the District Court denied injunctive relief against enforcement of the provisions invalidated. Appellants submit this Statement to show that this is a proper direct appeal over which the Court has jurisdiction, and that the appeal presents important and substantial federal questions which merit plenary review.

CITATION TO OPINIONS BELOW

The orders and opinions of the United States District Court for the Southern District of Florida in this cause are not yet reported. The text of each order and opinion is set out in the Appendix, *infra*.

JURISDICTION

(i) On November 17, 1972, Appellants Paula Poe, Rita Roe, Pamela Harris, and Dr. Lynn P. Carmichael [1] filed a Verified Complaint [2] in the United States District Court for the Southern District of Florida, basing jurisdiction on 28 U.S.C. §§ 1343(3), 1331, and 1332, as implemented by 42 U.S.C. § 1983 and 28 U.S.C. § 2201. The aforesaid Appellants alleged a class action

[1] Dr. William Shore and Dr. Richard Herman, Plaintiffs below, have moved from the State of Florida and are not included as Appellants.

[2] The Verified Complaint and all other documents referred to in this Jurisdictional Statement are part of the record on appeal.

and complained that certain provisions of the Florida Abortion Law violated the federal Constitution and inflicted grave and irreparable injury upon them. Appellants Nancy Coe and Patricia Noe filed similar verified complaints and were granted leave to intervene by order of the District Court filed February 14, 1973 (App. at 11a). All Appellants, from their respective positions as pregnant women, practicing physicians, and counselors, requested a three-judge court to be convened pursuant to 28 U.S.C. §§ 2281, 2284, to declare unconstitutional the contested abortion law restrictions, and to enjoin Defendant-Appellees from enforcing those provisions.

(ii) The final judgment of the statutory three-judge District Court, granting Appellants Nancy Coe, Patricia Noe, and Dr. Lynn P. Carmichael declaratory relief, but denying any injunction, was filed August 14, 1973 (App. at 4a). Orders denying preliminary injunctive relief and temporary restraints requested by Appellants Paula Poe, Rita Roe, and Pamela Harris, had been filed on January 2, 1973, and February 14, 1973 (App. at 11a, 13a). Appellees' Petition for Rehearing was denied October 29, 1973 (App. at 2a). Thereafter, Appellants filed a timely Notice of Appeal on December 21, 1973 (App. at 1a).

(iii) Jurisdiction of this Court to review by direct appeal the three-judge District Court's final judgment denying a permanent injunction is conferred by 28 U.S.C. § 1253.

(iv) Cases which sustain the jurisdiction of this Court are *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973).

STATUTES INVOLVED

15A Fla. Stat. Ann. § 458.22, at 37-38 (Cum. Pkt. Pt. 1973), with contested provisions in italics, provides:

"458.22 Termination of pregnancies

(1) Definitions.—As used in this section, unless the context clearly requires otherwise:

(a) 'Physician' means a doctor of medicine or osteopathic medicine licensed by the state under chapter 458 or chapter 459 or a physician practicing medicine or osteopathy in the employment of the United States or this state.

(b) 'Approved facility' means a hospital licensed by the state and accredited by the Joint Commission on Accreditation of Hospitals or approved by the American Osteopathic Hospital Association or a medical facility licensed by the division of health pursuant to rules and regulations adopted for that purpose, provided such rules and regulations shall require regular evaluation and review procedures.

(2) Termination of pregnancy.—It shall be unlawful to terminate the pregnancy of a human being unless the pregnancy is terminated *in an approved facility* by a physician who certifies in writing that:

(a) To a reasonable degree of medical certainty the continuation of the pregnancy would substantially impair the life or health of the female; or

(b) There is substantial risk that the continuation of the pregnancy would result in the birth of a child with a serious physical or mental defect; or

(c) There is reasonable cause to believe that the pregnancy resulted from rape or incest.

(3) Writings required.—*One of* the following shall be obtained by the physician prior to terminating a pregnancy:

(a) The written request of the pregnant woman *and, if she is married, the written consent of her husband, unless the husband is voluntarily living apart from the wife*, or

(b) *If the pregnant woman is under eighteen years of age and unmarried, in addition to her written request, the written consent of a parent, custodian, or legal guardian must be obtained, or*

(c) Notwithstanding paragraphs (a) and (b) of this subsection, a physician may terminate a pregnancy provided he has obtained at least one corroborative medical opinion attesting to the medical necessity for emergency medical procedures and to the fact that to a reasonable degree of medical certainty the continuation of the pregnancy would threaten the life of the pregnant woman."

Rules on Termination of Pregnancy, Division of Health, c. 10D-65, § 10D-0.05 (1972), provides:

"10D-0.05 Use of Advertising

It shall be unlawful for any person, association, co-partnership, corporation or institution to use or advertise to the public in any way or by any medium whatsoever their facility as approved for the purpose of performing procedures resulting in the termination of pregnancy. The Division of Health will furnish lists of *licensed* facilities *to physicians and health agencies* on request."

QUESTIONS PRESENTED

1.

Whether the "Husband Veto Clause" of the Florida Abortion Law Invades a Pregnant Married Woman's

Individual Right of Privacy In Violation of the Due Process Clause of the Fourteenth Amendment?

II.

Whether the "Parental Veto Clause" of the Florida Abortion Law Invades a Pregnant Minor Woman's Individual Right of Privacy In Violation of the Due Process Clause of the Fourteenth Amendment?

III.

Whether the "Approved Facility Clause" of the Florida Abortion Law Violates the Due Process Clause of the Fourteenth Amendment?

IV.

Whether the Absolute Prohibition on the "Use of Advertising" by a Facility Approved for Performing Abortions Violates the First and Fourteenth Amendments?

V.

Whether Plaintiff-Appellant Paula Poe, a Married Woman Whose Husband Would Not Approve a Therapeutic Abortion, Had Standing to Maintain a Class Action Against the Spouse Consent Statute Where Pregnant When the Complaint Was Filed and Temporary Restraining Order Requested Although Not at the Time of the Three-Judge Court Hearing?

VI.

Whether Plaintiff-Appellant Rita Roe, a Minor Under the Age of Eighteen Whose Parents Would Not Approve a Therapeutic Abortion, Had Standing to Maintain a Class Action Against the Parental Consent

Statute Where Pregnant When the Complaint Was Filed and Temporary Restraining Order Requested Although Not at the Time of the Three-Judge Court Hearing?

VII.

Whether Plaintiff-Appellant Pamela Harris, a Professional Counselor Regularly Engaged in Referring a Cross-Section of Women for Therapeutic Abortions, Had Standing to Contest the Spouse and Parental Consent Statutes as Well as the Prohibition Against Advertising by Abortion Facilities, Where Affected by Each Restriction on a Recurring Basis?

VIII.

Whether the Three-Judge Court Should Have Issued the Requested Temporary Restraining Orders, Preliminary Injunctions, and Permanent Injunctions Sought by Plaintiffs?

STATEMENT OF THE CASE

Appellants are four women who were pregnant at the time their verified complaints were filed, one professional counselor, and one physician. Each claimed that certain provisions of the Florida Abortion Law, 15A FLA. STAT. ANN. § 458.22, at 37-38 (Cum. Pkt. Pt. 1973), affected her or him adversely. All sought declaratory and injunctive relief from a duly convened three-judge federal court.

Appellant Paula Poe (a pseudonym),[3] then age 19, was pregnant, married, and separated from her then-husband to avoid physical brutality. Barred from ob-

[3] The three-judge court received and viewed sealed affidavits signed by Paula Poe, Rita Roe, Nancy Coe, and Patricia Noe.

taining an abortion without her husband's written consent. 15A FLA. STAT. ANN. § 458.22(3)(a), at 38 (Cum. Pkt. Pt. 1973). Paula Poe sued on behalf of herself and the class similarly situated to contest the "spouse veto" provision as an abridgment of her fundamental personal right of privacy recognized in *Roe* v. *Wade*, 410 U.S. 113 (1973).

Appellant Nancy Coe, then age 28, who was granted leave to intervene (J.S. at 12a), also was married, pregnant, and the victim of "spouse veto" accompanied by physical beating and threats to have her criminally prosecuted if she sought an abortion.

Nancy Coe additionally contested the "approved facility" provision of the Florida Abortion Law, 15A FLA. STAT. ANN. § 458.22(1)(b), (2), at 37-38 (Cum. Pkt. Pt. 1973), and the Rules on Termination of Pregnancy, issued by the Division of Health, including the prohibition on advertising to the public. *Id.*, c. 10D-65, § 10D-0.05 (1972). These were alleged to limit her access to medical facilities and information, in a manner and to an extent prohibited by *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973).

Appellant Rita Roe, then age 16, was pregnant, unmarried, and living with her parents, both of whom opposed therapeutic abortion for religious and moral reasons unpersuasive to Rita Roe. She was fearful of seeking parental consent because of the futility of asking and the further risk of physical brutality such as had been previously inflicted by her father, who had alcoholic tendencies. Unwilling and presumably unable to obtain the written parental consent required by 15A FLA. STAT. ANN. § 458.22(3)(b), at 38 (Cum.

Pkt. Pt. 1973), Rita Roe sued on behalf of herself and the class similarly situated to contest the "parental veto" provision as an abridgment of her fundamental personal right of privacy recognized in *Roe* v. *Wade*, 410 U.S. 113 (1973).

Appellant Patricia Noe, then age 17, who was granted leave to intervene (J.S. at 12a), also was pregnant, unmarried, and living with her parents. Patricia Noe had been an abortion patient eight months earlier, with parental consent. At that time, her parents threatened to send her away should she become pregnant again.

In addition to the "parental veto" clause, Patricia Noe contested the "approved facility" provision and the prohibition on advertising to the public.

Appellant Pamela Harris was Director of Counseling at the Center for Dialogue in Miami. She was responsible for counseling women regarding access to therapeutic abortion, birth control, adoption, childbirth, nutrition, and V.D. detection. There were also five clergy and eight other women who were counselors in this program, which was started by a group of clergy in July, 1970. The counseling program referred about 65 women per week for legal therapeutic abortions in Florida, the District of Columbia, and New York City.

Pamela Harris contested both the "parental veto" and "spouse veto" provisions of the Florida Abortion Law as restrictive of her own options as a professional counselor. Similarly, she was restrained by the "approved facility" requirement and the bar on advertising to the public.

Appellant Dr. Lynn P. Carmichael was and is the Chairman of the Department of Family Medicine at

the University of Miami School of Medicine. Dr. Carmichael contested the "parental veto" and "spouse veto" provisions of the Florida Abortion Law as abridgments of his right to administer health care and his patients' rights of privacy. These restrictions affect him on a regular and recurring basis. To defy them was to risk loss of medical license,[4] possible civil actions by parents or spouse,[5] and criminal prosecution.[6]

Appellee Richard E. Gerstein was and is the State Attorney for the Eleventh Judicial Circuit, empowered to prosecute violations of the statutory provisions at issue.

Appellee Wilson T. Sowder was and is the Director of the Florida Division of Health, charged with enforcing the licensing requirement of the "approved facility" provision, including the bar on advertising to the public.

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[4] 15A FLA. STAT. ANN. § 458.1201(1)(i), at 24-25 (Cum. Pkt. Pt. 1973), empowers the state board of medical examiners to revoke a physician's license for "[p]rocuring, aiding or abetting on the procuring of an unlawful termination of pregnancy . . . ."

[5] In Brown v. Wood, 202 So.2d 125 (Fla. D. Ct. App. 1967), an intermediate appellate court allowed an action by parents for failure of a physician to obtain *their* informed consent in operating on a minor. *See also* Jones v. Smith, 278 So. 2d 339 (Fla. D. Ct. App. 1973), *petition for cert. filed*, 42 U.S.L.W. 3434 (U.S. Jan. 21, 1974) (No. 73-1133) (injunctive action by putative father to restrain abortion).

[6] Violation of the consent provisions is a misdemeanor. 15A FLA. STAT. ANN. § 458.22(6), at 38 (Cum. Pkt. Pt. 1973). Early cases found the crime complete if a Defendant simply advised or prescribed a course of action that would violate the abortion law. Eggart v. State, 40 Fla. 527, 25 So. 144 (1899).

Appellee Robert L. Shevin was and is the Attorney General of the State of Florida, charged with issuing opinions and defending the laws of the State.

Paula Poe and Rita Roe requested, and were denied, temporary restraining orders at the time the original complaint was filed. J.S. at 17a-19a. They were ten and seven weeks pregnant, respectively, at that time. Neither was still pregnant when the three judges convened for hearing about one month later, December 21, 1972. J.S. at 13a. The three-judge court dismissed them from the case forthwith, rejecting Plaintiffs' contention that pregnant plaintiffs could no more be required to await a hearing than the outcome of appeals in the distant future. *See Roe* v. *Wade*, 410 U.S. at 125. After *Roe* was decided, the three-judge court, on February 14, 1973, denied a motion for rehearing and summary judgment submitted by Paula Poe and Rita Roe. J.S. at 11a.

Nancy Coe and Patricia Noe intervened by application and verified complaint filed February 2, 1973. Both sought temporary restraining orders and preliminary injunctions. These were denied on February 14, 1973. J.S. at 12a. Pamela Harris also was dismissed from the case on February 14, 1973. *Id.*

The three-judge court held a final hearing on the merits, with Nancy Coe, Patricia Noe, and Dr. Carmichael still in the case, on the morning of March 13, 1973. An opinion issued almost exactly five months later. J.S. at 4a-10a. The Court entered a corrective order on August 23, 1973 (J.S. at 3a), and denied Defendant-Appellees Motion for Rehearing on October 29, 1973. J.S. at 2a. At this time the judgment became final as to all parties. Appellees have filed appeals

both with this Court and the United States Court of Appeals for the Fifth Circuit. The Court of Appeals has stayed any further proceedings pending disposition here of *Gerstein* v. *Coe*, No. 73-1157, docketed January 28, 1974. Appellants here have filed a Motion to Affirm or Dismiss. *Gerstein* v. *Coe*, *supra*, moreover, is an appeal only from the declaratory judgment granted with respect to the "spousal or parental consent" requirements of the abortion law. The present appeal is from denial of an injunction against enforcement of all of the provisions declared unconstitutional.

The three-judge court held that the "parental or spousal consent" requirements must be held unconstitutional in light of the reasoning employed by *Roe* v. *Wade*, 410 U.S. 113 (1973). The opinion is reprinted in full in the Appendix, J.S. at 4a-10a.

As to the "approved facility" requirement, the Appellees acknowledged that *Roe* v. *Wade*, *supra*, and *Doe* v. *Bolton*, *supra*, foreclosed any possible defense. J.S. at 5a-6a. The three-judge court, moreover, expressly held that "the 'approved facility' requirement, and the Division of Health Rules, Ch. 10D-65, are constitutionally invalid because they make no distinction between the first trimester of pregnancy, a period in which the State may not interfere by regulating a woman's decision to terminate a pregnancy, and the latter trimesters . . . ." J.S. at 6a. This effectively disposed, also, of the prohibition on advertising. The appeals by the State and this appeal followed. Appellants filed their Notice of Appeal under 28 U.S.C. § 1253 on December 21, 1973.

THE QUESTIONS ARE SUBSTANTIAL

Introduction

The questions presented by this appeal encompass most of the major issues in the abortion field left unresolved by the comprehensive opinions of this Court in *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973). Each contested provision of the Florida Abortion Law is similar to one in a substantial number of states. Each provision affects the lives of tens of thousands of individuals annually. Each is the subject of a large volume of pending litigation and will reach this Court eventually in any event. Each has significant implications for other areas of law and medicine. Finally, each is of special concern to organized medicine, physicians generally, and patients in particular. Moreover, several of the issues were taken up by the Commission on Population Growth and the American Future.

I.

The "Husband Veto Clause" of the Florida Abortion Law Invades a Pregnant Married Woman's Individual Right of Privacy in Violation of the Due Process Clause of the Fourteenth Amendment.

Neither *Roe* nor *Doe*, *supra*, involved an abortion law purporting to bestow veto rights on the pregnant woman's spouse. *Roe*, in fact, expressly declined to address the issue of "the father's rights, if any . . . ." 410 U.S. at 165, n.67.

The issue, however, is squarely presented by this appeal. 15A FLA. STAT. ANN. § 458.22(3)(a), at 38 (Cum. Pkt. Pt. 1973), expressly provides that a married woman seeking a therapeutic abortion must pro-

vide the physician with "written consent of her husband, unless the husband is voluntarily living apart from the wife" or in case of life-threatening emergency. *Id.* § 458.22(3)(e), at 38. This written consent, moreover, amounts to a veto, because the husband may withhold consent for any reason, for reasons forbidden to the State by *Roe* v. *Wade*, or for no reason at all. "[N]o other voluntary medical or surgical procedure for which [Florida] requires confirmation by . . ." the husband can be found. *Cf. Doe* v. *Bolton*, 410 U.S. 179, 199 (1973) (invalidating requirement that two other physicians approve an abortion). No requirement of spouse consent was contained in the Model Penal Code or Uniform Abortion Act proposals. *Doe* v. *Bolton, supra*, 410 U.S. at 194.

At least fifteen States, however, require spouse consent by statute for therapeutic abortion under some circumstances amounting to a veto.[7] Nationwide studies on abortion show that substantial numbers of women are affected, in that at least 29.9% of abortion patients are currently married.[8] Hospitals and clinics, of course, may well impose a spouse consent requirement as an added element of presumed self-protection, regardless of local law. These factors are indicators of the significance of the issue.

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[7] These are Alaska, Arkansas, Florida, Colorado, Idaho, Indiana, Louisiana, Nebraska, Nevada, Oregon, South Carolina, South Dakota, Virginia, Utah, and Washington. *See* 2 Family Planning/Population Reporter 150-53 (Dec. 1973); *see also* Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973) (three judge court) (invalidating entire Utah statute).

[8] *See* Tietze & Lewit, *Joint Program for the Study of Abortion*, 3 Studies in Family Planning 97, 100, Table 1 (June 1972).

Case law provides no definitive guidance. The decision of this Court in *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972), favors Appellants in stating:

> "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (Emphasis in Opinion).

Yet, *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), emphasized solely the right of *marital* privacy. A decision by this Court is needed to dispel the uncertainty."

"The only three-judge federal court decisions ruling upon a spouse consent provision found them unconstitutional in light of Roe v. Wade, supra, and Doe v. Bolton, supra. These are the present case and Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973). *See also* Coe v. D.C. General Hosp., Civ. No. 1477-71 (D.D.C. June 5, 1972) (unreported) (spouse consent not required in D.C.).

Periodic injunctive actions to prevent an abortion have uniformly rejected any paternal interest. *See* Jones v. Smith, 278 So.2d 339 (Fla. D. Ct. App. 1973), *petition for cert. filed*, 42 U.S.L.W. 3434 (U.S. Jan. 1, 1974) (No. 73-1133); O'Beirne v. Superior Court, 1 Civ. 25174 (Cal. Sup. Ct. Dec. 6, 1967) (unreported).

A number of tort, malpractice, and contract actions appear to hold that a married woman may consent for herself alone when seeking medical or surgical care. *See* Rosenberg v. Feigin, 119 Cal. App. 2d 783, 260 P.2d 143 (D. Ct. App. 1953); Herko v. Uviller, 203 Misc. 108, 114 N.Y.S.2d 618 (Sup. Ct. 1952); Kritzer v. Citron, 101 Cal. App. 2d 33, 224 P.2d 808 (D. Ct. App. 1950); Burroughs v. Crichton, 48 App. D.C. 596 (1919); Maryland v. Housekeeper, 170 Md. 162, 16 Atl. 382 (1888); M'Clallen v. Adams, 19 Pick. (Mass.) 333 (1837).

Early common law cases often suggest that medical care is a necessity for which a husband is obligated to pay. These date

II.

The "Parental Veto Clause" of the Florida Abortion Law Invades a Pregnant Minor Woman's Individual Right of Privacy in Violation of the Due Process Clause of the Fourteenth Amendment.

Roe and *Doe* also expressly declined to express any view on the constitutionality of state laws bestowing veto rights on the parents of a pregnant minor. 410 U.S. at 165, n. 67.

The parental consent issue, however, is squarely presented here. 15A FLA. STAT. ANN. § 458.22(3)(b), at 38 (Cum. Pkt. Pt. 1973), expressly requires the physician to obtain, "[i]f the pregnant woman is under eighteen years of age and unmarried . . . the written consent of a parent, custodian, or legal guardian . . . ," except in case of life-threatening emergency. *Id.* § 458.22(3)(c), at 38. This third party consent, moreover, sanctions a veto, because the parents may deny permission for any reason, for reasons denied legitimacy by *Roe* and *Doe*, or for no reason at all. No parental consent provision was embodied in the Model Penal Code or Uniform Abortion Act proposals cited in *Doe* v. *Bolton*, *supra*, 410 U.S. at 194.

At least eighteen States, however, require parental consent by statute for therapeutic abortion in the case of all or some minors, and in circumstances granting a

---

as far back as Harris v. Lee, 1 P. Wms. 482, 24 E.R. 482 (Ch. 1718).

A bizarre variation is an action for separation, Sheldon v. Sheldon, 146 App. Div. 430, 131 N.Y.S. 291 (2d Dep't 1911). Dr. Sheldon had apparently anesthetized his wife each time she became pregnant and aborted her, thereby depriving her "of the maternal joy so highly prized by every good woman . . . ." She was granted the requested separation.

virtual absolute veto.[10] Such provisions have serious impact. As many as 24% of abortion patients are less than 20 years of age.[11] In addition to statutes, minors must also contend with restrictive hospital and clinic rules not necessarily required by statute or case law.

The language and rationale of *Roe* v. *Wade*, 410 U.S. 113 (1973), apply with equal or greater force to protect the right of privacy of a pregnant minor from parental veto. Unwanted pregnancy in a minor can be a far greater threat to physical and mental health than in the case of a healthy unmarried adult. *See* Menken, *Health and Social Consequences of Teenage Childbearing*, 4 Family Planning Perspectives No. 3, at 45 (July 1972). Moreover, illegitimate births among young women in the 15 to 19 age range more than doubled between 1940 and 1968.[12] Teenagers gave birth to an estimated 180,000 illegitimate children during the year 1970. *U.S. Bureau of the Census, Current Population Reports, Series* P-23, No. 36 (1971). However,

> "[t]hese figures do not take into account the number of premarital pregnancies which have forced early marriages. . . . In one state in which figures are available, 48 percent of teenage mar-

[10] These are Alaska, Arkansas, Florida, Colorado, Delaware, Indiana, Louisiana, Missouri, Nebraska, Nevada, New Mexico, Oregon, South Carolina, South Dakota, Texas, Virginia, Utah, and Washington. *See* Family Planning/Population Reporter 150-53 (Dec. 1973); Pilpel & Zuckerman, *Abortion and the Rights of Minors*, 23 W. Res. L. Rev. 779 (1972); *see also* Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973).

[11] *See* Tietze & Lewit, *supra* note 8, at 100, Table 1.

[12] Cutright, *The Teenage Sexual Revolution and the Myth of An Abstinent Past*, 4 Family Planning Perspectives No. 1, at 24 (1972).

> riages involved a premarital pregnancy. Approximately one-half of these marriages end in divorce within the first four years." *Statement on Teenage Pregnancy, American College of Obstetricians and Gynecologists* (Apr. 10, 1970).

By its terms the Fourteenth Amendment embraces the rights of minors as much as adults. The Amendment, for example, defines citizenship as being conferred upon those "born or naturalized" in the United States, not just adults.

Case law, also, repeatedly applies the First, Fourth, Fifth, Sixth, and Fourteenth Amendments, and numerous clauses therein, to secure rights for minors.

The First Amendment guarantee against laws "respecting an establishment of religion" has been successfully invoked by school children to bar compulsory prayers. *See Engel* v. *Vitale*, 370 U.S. 421 (1962). Neither *Engel* nor the many other school-prayer and Bible-verse decisions suggest that the minor's right to be protected from government imposed religion could be waived by a parent. Indeed, the presence of a minor with standing to sue was held absolutely indispensable to a similar prayer case in *Doremus* v. *Board of Education*, 342 U.S. 429 (1952). *See also School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944).

First Amendment free speech rights have similarly been held available to minors and school children. *Tinker* v. *Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969). A majority of the Court in *Tinker* held:

> "School officials do not possess absolute authority over their students. Students in school as well as

> out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect. . . ." (393 U.S. at 511).

In no way did the Court suggest that the First Amendment protected only those students whose parents shared their views.

Decisions such as *Tinker* have a history going back more than fifty years, to the landmark decision of *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). *Meyer* struck down a state law which forbad the teaching of modern foreign languages in all states schools, public or private. Rights of "a child of ten years," 262 U.S. at 396, were at issue, encompassing the rights "of pupils to acquire knowledge," 262 U.S. at 401, which were aspects of "liberty" secured by the Fourteenth Amendment.

While the *Engel-Tinker-Meyer* line of cases concentrated on substantive constitutional rights, *Brown* v. *Board of Education*, 347 U.S. 483 (1954), spawned a line of decisions barring discrimination against minors, not only in access to education, but also in numerous respects where neither race nor education was an issue. Indeed, fourteen years after *Brown*, the Court was to hold:

> "[I]llegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment." *Levy* v. *Louisiana*, 391 U.S. 68, 70 (1968).

If illegitimate children, regardless of age, are "persons" under the Fourteenth Amendment, *a fortiori*, unmarried pregnant minors have comparable constitutional status.

In virtually all spheres of litigation the minor person has received the protections and benefits of the Bill of Rights. Nowhere has this been more consistently the case than with respect to the rights of minors accused of juvenile offenses.

In re Gault, 387 U.S. 1 (1967), was the fountainhead of juvenile rights in offender proceedings. The case pointedly held:

> "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." (387 U.S. at 13).

Gault applied the procedural constitutional rights to notice, confrontation, cross-examination, and the privilege against self-incrimination to minors in juvenile proceedings. The Court has repeatedly reaffirmed *Gault*, most recently including the right to insist that proof be beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970).

In sum, a substantial body of case law acknowledges the fact that the Bill of Rights is not marked "adults only." With respect to freedom of religion, free speech, freedom from invidious discrimination, and fundamental fairness in juvenile offender proceedings, a minor is protected by the Bill of Rights, and not excluded as a "non-person."

The cases and language of the Constitution support this approach to the protection of fundamental personal rights in general. Indeed, the reasons behind the Bill of Rights have very little to do with chronological age. Similarly, a young woman's need for medical care to terminate pregnancy is also wholly unrelated to age.

In effect, the veto clause leaves to the whim or wisdom of parents a choice of dramatic lifelong significance to any woman, regardless of her age. As the Court stated in *Roe:*

> "The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically or otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation." 410 U.S. at 153.

State authority to enforce the obedience of minors to parents is a practice which must be challenged in this area. If one parent can veto an abortion for any reason, another parent may attempt to compel an abortion. The latter was the factual setting of *In re Smith*, 16 Md. App. 209, 295 A.2d 238 (Ct. Spec. App. 1972), where an appellate court in emergency session prevented a sheriff from taking a young woman to the hospital for a forced abortion insisted upon by her mother.

Accordingly, the constitutionality of the "parental veto" provision of the Florida Abortion Law is sufficiently important to warrant plenary consideration by the Court.

III.

The "Approved Facility Clause" of the Florida Abortion Law Violates the Due Process Clause of the Fourteenth Amendment.

A third provision of the Florida Abortion Law required that physicians operate only in an "approved facility," i.e., a JCAH-accredited hospital or other facility licensed by the Division of Health. With regard to this provision, the District Court stated:

> "The State of Florida has expressly abandoned any defense relating to the 'approved facility' requirement or to the 'Rules,' Ch. 10D-65 in its entirety, acknowledging that these issues are foreclosed by the decisions in *Roe* v. *Wade*, *supra*, and *Doe* v. *Bolton*, *supra*. We agree that these issues are foreclosed and hold that F.S.A. sec. 458.22(2), the 'approved facility' requirement, and the Division of Health Rules, Ch. 10D-65, are constitutionally invalid because they make no distinction between the first trimester of pregnancy, a period in which the State may not interfere by regulating a woman's decision to terminate a pregnancy, and the latter trimesters where the State may impose regulations reasonably related to the preservation and protection of maternal health. *Roe* v. *Wade*, 93 S.Ct. at 731-32." J.S. at 5a-6a.

However, the Court below did not enjoin enforcement of the provision and it is at issue on this appeal.

IV.

The Absolute Prohibition on the "Use of Advertising" by a Facility Approved for Performing Abortions Violates the First and Fourteenth Amendments

In abandoning defense of the Division of Health Rules, the State also conceded that the prohibition on any form of advertising was invalid. Plaintiffs had

contested this provision as overbroad in violation of the First and Fourteenth Amendments. The restriction had not been narrowly limited to a ban on purely commercial solicitation of patients, but swept broadly to interdict the flow of information involving the simple availability of medical facilities generally for the performance of abortions.

Particularly in the sphere of birth control and abortion, widespread public access to information is important. "[B]etween 5.7 and 10.8 million women can be considered to need the help of a national family planning program—clinic services, subsidy, removal of barriers to private physician care, or some combination of these." Dryfoos, *A Formula For the 1970s: Estimating Need For Subsidized Family Planning Services*, 5 Family Planning Perspectives No. 3, at 147 (1973). An important element of this equation is access to information in those media which the general public most frequently view.

At the time this action was commenced the Division of Health had not licensed any clinics, so none could complain of the restriction on informational advertising. However, the other Plaintiffs had standing to seek injunctive relief as potential recipients of the information in question.

Lamont v. *Postmaster General*, 381 U.S. 301 (1965), squarely upholds the standing of recipients to assert First Amendment rights. Similarly, *Hiett* v. *United States*, 415 F.2d 664 (5th Cir. 1969), acknowledged "the addressee's right to receive information," 465 F.2d at 671, concerning the availability of Mexican divorces.

The concurring opinion of Mr. Justice Brennan in *Lamont, supra*, addresses itself to this problem:

> "[T]he Bill of Rights goes beyond the specific guarantees to protect those equally fundamental personal rights necessary to make the express guarantees fully meaningful. [Citations omitted.] [T]he right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." 381 U.S. at 308.

The regulation in question directly abridges this right to receive information, when sent by a particular kind of distributor. Nothing in the First Amendment, however, authorizes a distinction based upon the nature of a publisher or distributor. Indeed, it is difficult to find a decision involving a First Amendment claim asserted by any litigant other than one operating as a business. *See, e.g., New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963).

The fact that the State may construe dissemination of information by a clinic as "advertising" is not controlling. An extensive study of the commercial noncommercial factors of First Amendment activity made this point well:

> "A distinction based on the advertiser's self-serving motive is inadequate, however, for much political and other traditionally protected expression is motivated by self-interest.
>
> "The interest in communicating economic offers and needs may be more immediately vital to the welfare of an individual or group than its interest in political or other noneconomic expression." Note, *Freedom of Expression in a Commercial Context*, 78 Harv. L. Rev. 1191, 1192, 1194 (1965).

The requirement of carefully tailored legislation in areas that touch upon fundamental personal rights is summarized by the principle in *Elfbrandt* v. *Russell*, 384 U.S. 11, 18 (1966):

> "Legitimate legislative goals 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'"

See generally Wormuth & Merkin, *The Doctrine of the Reasonable Alternative*, 9 Utah L. Rev. 254 (1964); Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970); Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464 (1969).

As to the present regulation, the dignity of the medical profession and ethics can be protected by *regulating* the nature of the advertising to prevent commercial solicitation, not by depriving the public of access to such important information.

V.

Plaintiff-Appellant Paula Poe, a Married Woman Whose Husband Would Not Approve a Therapeutic Abortion, Had Standing To Maintain a Class Action Against the Spouse Consent Statute Where Pregnant When the Complaint Was Filed and Temporary Restraining Order Requested Although Not at the Time of the Three-Judge Court Hearing

The three-judge court dismissed Paula Poe's class action from the case upon being informed that she chose not to stay pregnant pending deliberations by the full court, where she had already been denied a temporary restraining order one month earlier. J.S. at 13a, 19a. Paula Poe acted as she did because she had been ten to eleven weeks pregnant when the complaint was filed. To await further deliberations beyond those

on the temporary restraining order would have subjected her to increased medical risk. As *Roe* v. *Wade*, 410 U.S. 113, 125 (1973), subsequently made clear, when "pregnancy is a significant fact in the litigation," traditional doctrines of mootness do not apply. "Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review.' " 410 U.S. at 125. It was serious error to dismiss Paula Poe from the action and deny her declaratory and injunctive relief. Indeed, as events developed, a decision on the merits for the pregnant intervenors was not forthcoming until five months after the final hearing.

VI.

Plaintiff-Appellant Rita Roe, a Minor Under the Age of Eighteen Whose Parents Would Not Approve a Therapeutic Abortion, Had Standing To Maintain a Class Action Against the Parental Consent Statute Where Pregnant When the Complaint Was Filed and Temporary Restraining Order Requested Although Not at the Time of the Three-Judge Court Hearing

What is said above applies with equal force to the error in dismissing Rita Roe from the action for not remaining pregnant while the three-judge court deliberated. She too had reached the end of the first trimester of pregnancy and needed medical treatment almost immediately to avoid health-threatening increased risk.

While *Roe* v. *Wade*, *supra*, appeared to settle these standing questions, the three-judge court denied a rehearing sought by Rita Roe and Paula Poe on the basis of the *Roe* rationale. Denial was summary. There was no opinion stating a reasoned justification. This was serious error and warrants review here.

VII.

Plaintiff-Appellant Pamela Harris, a Professional Counselor Regularly Engaged in Referring a Cross-Section of Women for Therapeutic Abortions, Had Standing To Contest the Spouse and Parental Consent Statutes as Well as the Prohibition Against Advertising by Abortion Facilities, Where Affected by Each Restriction on a Recurring Basis

Over the dissent of Judge Eaton, the three-judge court dismissed Pamela Harris from the case for lack of standing. J.S. at 12a. Ms Harris, a professional counselor, engaged in the referral at that time of about 65 women per week for therapeutic abortions in Florida, New York City, and Washington, D. C. All of the statutory provisions at issue affected her day-to-day activities by limiting the facilities to which she could send women and the information she could provide.

While the three-judge court provided no rationale for summary dismissal, the short answer to that course is that Ms Harris could plainly be prosecuted as an accomplice or accessory for referring women to facilities that ignored the parental or spousal consent requirements. Indeed, Florida law left no doubt on that point. *See Eggart* v. *State*, 40 Fla. 527, 25 So. 144 (1899).

It was serious error to dismiss Ms Harris. *Doe* v. *Bolton*, 410 U.S. 179, 189 (1973), left the question open, but its resolution, in light of *Doe* and *Epperson* v. *Arkansas*, 393 U.S. 97 (1968), should be in favor of standing. Indeed, the effect of abortion laws on counselors and referrors is arguably far more direct and immediate than on some others who have admitted standing.

VIII.

The Three-Judge Court Should Have Issued the Requested Temporary Restraining Orders, Preliminary Injunctions, and Permanent Injunctions Sought by Plaintiffs

The District Court declined to grant any equitable relief, leaving the impact of the declaratory judgment to the good will of prosecutors, hospital administrators, and physicians. This was error, and there is a significant need for directions from this Court on the considerations involved in granting or denying such relief when no immediate prosecution is threatened.

Plaintiffs argued below that *Nichol* v. *Keenan*, 404 U.S. 1055 (1972) (per curiam), *aff'g* 326 F. Supp. 613 (W.D. Wis.), supported the grant by a single judge, *see* 28 U.S.C. § 2284(3), of temporary restraints. The District Court in *Nichol* had stated:

> (1) "[P]laintiffs enjoy a reasonably good chance to prevail . . . if the merits are reached . . ." [and]
>
> (2) "to withhold a temporary restraining order is to permit this constitutional right to be lost irreparably with respect to the physician and those women for whom he could otherwise perform the operation in the meantime . . . ."

This Court affirmed. 404 U.S. 1055. *See also Brown* v. *Choate*, 411 U.S. 452, 456 (1973). Affirmance must have meant at least that the two passages quoted above were correct.

In the present case, as *Roe* and *Doe* fully recognize, forcing a pregnant woman to continue to term against her will is serious and irreparable injury. Moreover, particularly after *Roe*, the probabilities of success on the merits could not be lightly discarded. Both temporary restraints and preliminary injunctions accord-

ingly should have been issued, and summary denial without explanation was an abuse of discretion.

Denial of permanent injunctions after the merits had been fully adjudicated also was error. Not only is a specific ruling on this aspect of a case necessary to facilitate direct appeal by the aggrieved State, but a bare declaratory judgment simply does not provide hospitals, clinics, and physicians with the degree of legal protection enabling them to dispense with parental or spouse consent. Without an injunction, the decision is ineffective. No physician will regard a federal court declaratory judgment as adequate protection against civil and criminal actions in the state courts. Plaintiff patients, therefore, need a permanent injunction to render the declaratory judgment effective.

CONCLUSION

For the reasons set out in this Jurisdictional Statement, the Court should note probable jurisdiction and set the case down for plenary consideration with briefs on the merits and oral argument.

Respectfully submitted,

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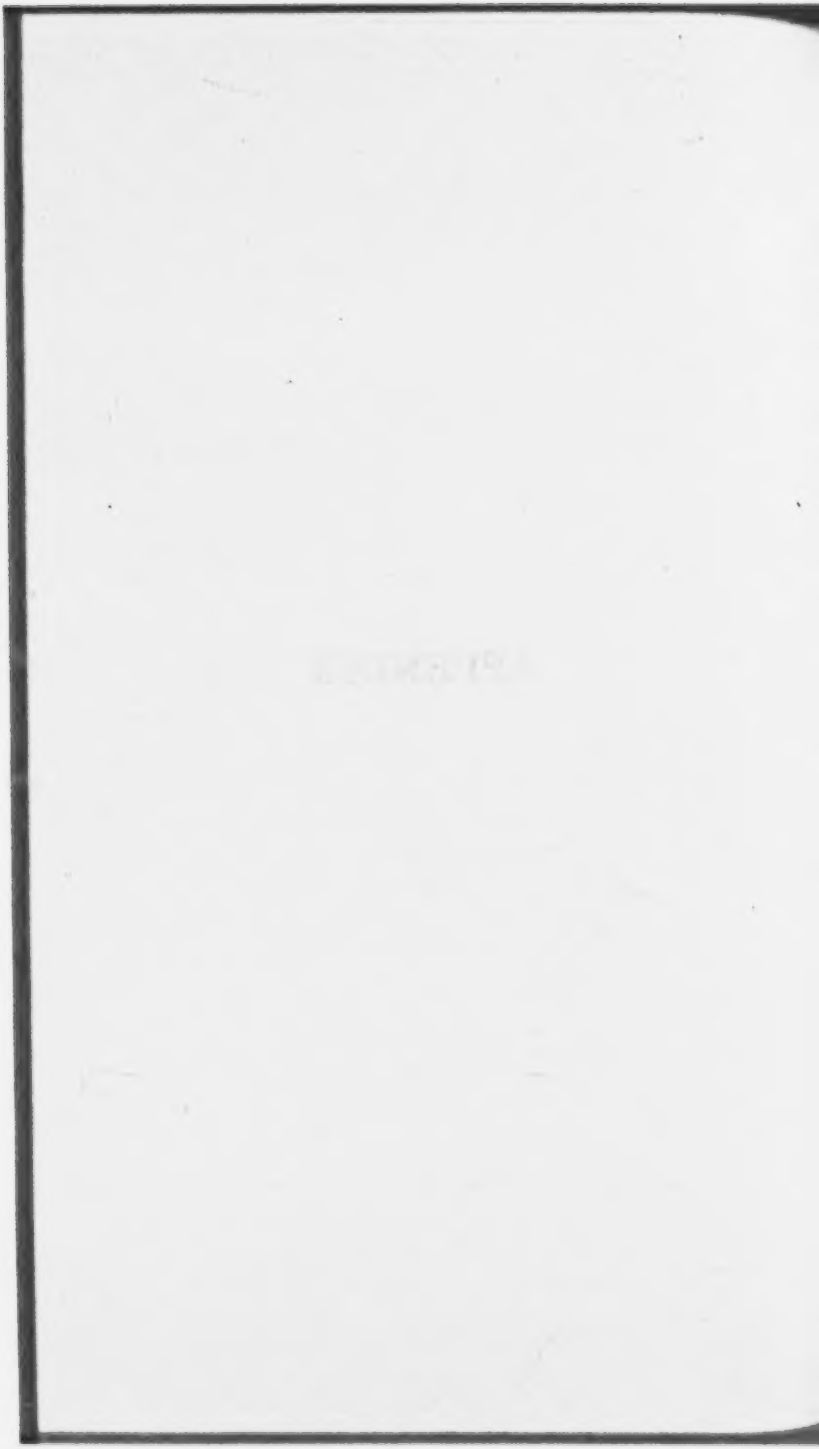
Dated: February 20, 1974.

APPENDIX



APPENDIX

Notice of Appeal to the Supreme Court of the United States From the United States District Court for the Southern District of Florida, Filed December 21, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 72-1842 Civil-JE

PAULA POE, RITA ROE, NANCY COE, PATRICIA NOE, PAMELA HARRIS, DR. LYNN P. CARMICHAEL, and all others similarly situated,
Plaintiffs,

v.

RICHARD E. GERSTEIN, WILSON T. SOWDER, ROBERT L. SHEVIN, their agents, those acting in concert with them, and all others similarly situated,
Defendants.

NOTICE OF APPEAL

Plaintiffs Paula Poe, Rita Roe, Nancy Coe, Patricia Noe, Pamela Harris, and Dr. Lynn P. Carmichael hereby appeal this Court's final judgments of October 29, 1973, denying a rehearing sought by Defendants respecting the final judgment of August 14, 1973, amended August 23, as follows:

1. Appeal is taken pursuant to 28 U.S.C. § 1253 from the denial of preliminary and permanent injunctive relief to all of the above Plaintiffs, and declaratory relief to Paula Poe, Rita Roe, and Pamela Harris.

2. Injunctive relief was denied as to enforcement of Fla. Stat. Ann. § 458.22(3) [the spousal and parental consent requirements for abortion], and the Rules on Termination of Pregnancy, Division of Health, Ch. 10D-65 and

§ 10D-0.05, which had been declared repugnant to the federal Constitution.

3. Both declaratory and injunctive relief were denied as to Plaintiffs Paula Poe, Rita Roe, and Pamela Harris.

/s/ Roy Lucas
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Attorneys for Plaintiffs.

Dated: December 10, 1973

[Certificate Omitted]

Order of the United States District Court, Denying Defendants' Petition for Rehearing, Entered October 29, 1973

United States District Court
Southern District of Florida
No. 72-1842-Civil-JE

* * * * * * * * * * *

Order

The Petition for Rehearing heretofore filed in this case is hereby Denied.

/s/ David W. Dyer
United States Circuit Judge

/s/ W. O. Mehrtens
United States District Judge

/s/ Joe Eaton
United States District Judge

Enter: this 29th day of October, 1973.

Order of the United States District Court, Under Rule 60, Fed. R. Civ. P., Amending Opinion of August 13, 1973, Filed August 23, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER 72-1842-CIV-JE

ORDER UNDER RULE 60 FEDERAL RULES OF CIVIL PROCEDURE

In issuing its Opinion in this case on August 13, 1973, the Court overlooked the fact that at least one provision of Florida Statute 458.22, not under attack in this case, is neither a minor procedural or definitional provision. Therefore, it is

ORDERED and ADJUDGED that the second sentence of the third paragraph of page numbered six of the Opinion is hereby deleted from the opinion. That sentence read as follows:

> "Since the primary substantive sections of the Florida Abortion Act, F.S.A. 458.22 are unconstitutional, the minor procedural and definitional provisions are no longer supported and the entire Act is invalid."

The effect of this correctional order is that only those sections of F.S.A. 458.22 that are directly attacked, specifically section 458.22(2) and section 458.22(3), have been declared unconstitutional.

This Court's opinion of August 13th, 1973 is otherwise unaffected by this Order.

DONE and ORDERED at Miami, Southern District of Florida, this 22 day of August, 1973.

/s/ DAVID W. DYER
United States Circuit Judge

/s/ W. O. MEHRTENS
United States District Judge

/s/ JOE EATON
United States District Judge

Opinion of the United States District Court, On Merits, Filed August 14, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER 72-1842-CIV-JE

OPINION

Before DYER, Circuit Judge, MEHRTENS and EATON, District Judges.

This class action for declaratory and injunctive relief, heard by a duly convened three-judge district court, is a constitutional challenge to Florida's regulation of therapeutic abortions. Three plaintiffs in this proceeding—Carmichael, Shore and Herman—are Florida-licensed physicians practicing in the field of Family Medicine. They attack the constitutionality of Fla. Stat. Ann. § 458.22(3) (1972) [hereinafter the "spousal or parental consent" requirement],[1] and § 10D-0.05 of Rules on Termination of Pregnancy, Division of Health, Ch. 10D-65 (1972) [herein-

[1] "F.S.A. sec. 458.22(3) Writings required.—

"One of the following shall be obtained by the physician prior to terminating a pregnancy:

(a) The written request of the pregnant woman and, if she is married, the written consent of her husband, unless the husband is voluntarily living apart from the wife, or

(b) If the pregnant woman is under eighteen years of age and unmarried, in addition to her written request, the written consent of a parent, custodian or legal guardian must be obtained, or

(c) Notwithstanding paragraphs (a) and (b) of this subsection, a physician may terminate a pregnancy provided he has obtained at least one corroborative medical opinion attesting to the medical necessity for emergency medical procedures and to the fact that to a reasonable degree of medical certainty the continuation of the pregnancy would threaten the life of the pregnant woman."

after "Rules", Ch. 10D-65], prohibiting public advertisement of medical facilities available for the termination of pregnancies. The complaint was filed prior to January 22, 1973, the date on which the United States Supreme Court handed down its decisions in *Roe* v. *Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and *Doe* v. *Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973). Subsequent to that date plaintiffs Coe[2] and Noe,[3] two females each pregnant for less than three months, were permitted to intervene. They join the physician-plaintiffs in attacking the constitutionality of the "spousal or parental consent" requirement, and in addition, challenge both Fla. Stat. Ann. § 458.22(2) (1972) [hereinafter the "approved facility" requirement], and Ch. 10D-65 of the "Rules" in its entirety—on the grounds that they are constitutionally impermissible State interferences with a woman's right of privacy, as that right encompasses the decision to terminate a pregnancy. The defendants are officials of the State of Florida charged with the enforcement of the disputed sections of the statute and the rules promulgated under the statute.

The State of Florida has expressly abandoned any defenses relating to the "approved facility" requirement or to the "Rules", Ch. 10D-65 in its entirety, acknowledging that these issues are foreclosed by the decisions in *Roe* v. *Wade*, *supra*, and *Doe* v. *Bolton*, *supra*. We agree that these issues are foreclosed and hold that F.S.A. § 458.22(2),

---

[2] Plaintiff Coe is a real person suing under a pseudonym to preserve her anonymity. She is a married woman unable to obtain her husband's consent for a therapeutic abortion which her physician has certified to be necessary to preserve her health. She is a citizen of Florida and a resident of this District.

[3] Plaintiff Noe is a real person suing under a pseudonym to preserve her anonymity. She is an unmarried minor unable to obtain parental consent for a therapeutic abortion which is necessary to preserve her health. She is a citizen of Florida and a resident of this District.

the "approved facility" requirement, and the Division of Health Rules, Ch. 10D-65, are constitutionally invalid because they make no distinction between the first trimester of pregnancy, a period in which the State may not interfere by regulating a woman's decision to terminate a pregnancy, and the latter trimesters where the State may impose regulations reasonably related to the preservation and protection of maternal health. *Roe* v. *Wade*, 93 S.Ct. at 731-32. In addition, neither the statute nor the "Rules" makes any distinction between the period prior to viability of the fetus, a period in which the State has no compelling interest in preserving and protecting potential life, and the period after viability where the State may regulate the termination of pregnancy to protect potential life. *Id.* Since the "approved facility" requirement and the "Rules" do not make these distinctions, they "sweep too broadly . . . [and], therefore, cannot survive the constitutional attack made upon [them] here." *Id.* at 732.

The only issue which the State of Florida has contested is plaintiffs' constitutional attack on F.S.A. § 458.22(3), the "spousal or parental consent" requirement. *Roe* v. *Wade*, *supra*, and *Doe* v. *Bolton*, *supra*, are not directly in point on this question. Those cases dealt specifically with the State's interest in the protection of potential life, which may be termed the interest of the fetus, and the State's interest in the protection of maternal health, which may be termed the interest of the mother. They did not address the interests of third parties, such as the husband or father, or the parents of an unmarried pregnant female minor. Neither issue was raised by the factual or statutory setting of the two cases, and the Supreme Court did not decide the constitutionality of these types of consent provisions.[4]

[4] "Neither in this opinion nor in *Doe* v. *Bolton*, *post*, do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in

In *Roe* v. *Wade*, *supra*, the Supreme Court concluded that "the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation." 93 S.Ct. at 727. State regulation limiting this right "may be justified only by a 'compelling state interest'." *Id.* at 728. Compelling state interests were recognized in two areas: (1) the State may intervene and regulate abortions to protect maternal health after approximately the end of the first trimester of pregnancy, and (2) the State may intervene and regulate, or even proscribe, abortions after the fetus becomes viable. *Id.* at 731-732. The State is therefore forbidden from any regulation, at least in order to protect maternal health or potential life, until these "compelling points" are reached; as a result, the pregnant woman's right of privacy is "sole" during the first trimester. *Id.* at 730.

We are persuaded that if the State cannot interfere to protect the fetus' interest in its potential life until the compelling point of viability is reached, neither can it interfere on behalf of husbands or parents to protect their interests in that potential life until the fetus becomes viable. We are persuaded, also, that if the State cannot interfere to protect the pregnant women's physical or mental health until approximately the end of the first trimester, neither can it interfere on behalf of husbands or parents to protect their interests in her health until that point is reached. If the State could demonstrate that the third-party interests sought to be protected by this provi-

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either of the cases . . . . We are aware that some statutes recognize the father under certain circumstances. North Carolina, for example . . . requires written permission for the abortion from the husband when the woman is a married minor, that is, when she is less than 18 years of age . . . ; if the woman is an unmarried minor, written permission from the parents is required. We need not now decide whether provisions of this kind are constitutional." *Roe* v. *Wade*, 93 S.Ct. at 733.

sion attach at the moment of conception and are interests which fall completely outside the categories of protection of maternal health and potential life, *Roe* v. *Wade*, *supra*, would not be controlling and the provisions would withstand constitutional attack.

We recognize that the interest of the husband in the embryo or fetus carried by his wife, especially if he is the father[5], is qualitatively different from the interest which the mother may have in her health and the interest of the viable fetus in its potential life. The interest which a husband has in seeing his procreation carried full term is, perhaps, at least equal to that of the mother. The biological bifurcation of the sexes, which dictates that the female alone carry the procreation of the two sexes, should not necessarily foreclose the active participation of the male in decisions relating to whether their mutual procreation should be aborted or allowed to prosper. It may be that the husband's interest in this mutual procreation attaches at the moment of conception.

We recognize further that the interest of parents within a family unit is qualitatively different, at least in part, from the interest which a pregnant minor daughter may have in her maternal health and the interest which the viable fetus may have in its potential life. The State of Florida has urged persuasively that the family unit is, except by positive provision of state law to the contrary, a self-governing entity and that the traditional and primary obligation for the custody, care, control, and nurture of minor children resides in their parents.

But while these paternal and parental interests may be compelling, and may in fact exist at the moment of conception, it is apparent that not *all* paternal or parental in-

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[5] We recognize that the husband of the pregnant woman may not always be the father of the potential child. We do not undertake to discuss the situation where the husband is not the father of the potential child, since the statute does not purport to deal with such a situation.

terests fall outside the categories of protection of maternal health and potential life. We cannot avoid the conclusion that at least a portion of the interests which husbands and parents have in their pregnant wives or minor daughters may be reasonably related to protection of maternal health and protection of potential life. The failure of the Florida "spousal or parental consent" requirement is that it gives to husbands and parents the authority to withhold consent for abortions for any reason or no reason at all. It allows a husband or parent to withhold consent out of concern for maternal health or the potential life of the fetus, in addition to other compelling reasons each may have for doing so.

As we learn from *Roe* v. *Wade*, *supra*, the State has no authority to interfere with a woman's right of privacy in the first trimester to protect maternal health nor can it interfere with that right before the fetus becomes viable in order to protect potential life. It follows inescapably that the State may not statutorily delegate to husbands and parents an authority the State does not possess.

We do not learn from the opinion in *Roe* v. *Wade*, *supra*, the age of plaintiff Roe, the pregnant woman who enjoyed the "fundamental", "*personal* right of privacy" [emphasis supplied] recognized by the Supreme Court. But we do know that a pregnant woman under 18 years of age cannot, under the law, be distinguished from one over 18 years of age in reference to "fundamental", "*personal*", constitutional rights.

Accordingly, we are compelled to hold F.S.A. § 458.22(3), the "spousal or parental consent" requirement unconstitutional.[6] Since the primary substantive sections of the

[6] Because of the practical problems involved in drafting or enforcing a statute which would exclude interests related to maternal health in the first trimester, we are inclined to agree with Mr. Justice Rehnquist (dissenting) that, as a practical matter, "a State may impose virtually no restrictions on the performance of abortions during the first trimester of pregnancy." *Roe* v. *Wade*, 93 S.Ct. at 736.

Florida Abortion Act, F.S.A. 458.22 are unconstitutional, the minor procedural and definitional provisions are no longer supported and the entire Act is invalid.

In holding the Florida "spousal or parental consent" requirement unconstitutional, this Court, of course, does not limit the traditional and substantial right which husbands and parents have in asserting their respective interests within the family unit. Certainly husbands ought to participate with their wives in decisions relating to whether or not their mutual procreation should be aborted or allowed to prosper, and parents ought to advise and guide their unmarried, minor daughters in a decision of such import. But a state which has no power to regulate abortions in certain areas simply cannot constitutionally grant power to husbands and parents to regulate in those areas. Therefore, husbands and parents cannot look to the state to prosecute and punish the physician (or other participants) who performs an abortion against the wishes of the husbands and parents.

We find it unnecessary to provide plaintiffs injunctive relief. We assume the defendants and other state officials charged with enforcement of the invalidated statute and its derivative rules will give full recognition to the judgment of this Court.

The Court retains jurisdiction to enter whatever orders necessary to be entered to effectuate this declaratory judgment.

Dated at Miami, Southern District of Florida, this 13th day of August, 1973.

/s/ DAVID W. DYER
United States Circuit Judge

/s/ W. O. MEHRTENS
United States District Judge

/s/ JOE EATON
United States District Judge

Order of the United States District Court, Denying Plaintiffs' Motions for Rehearing and Summary Judgment Regarding Paula Poe and Rita Roe, Denying Defendants' Motion to Dismiss Plaintiffs Carmichael, Shore, and Herman, Granting Defendants' Motion to Dismiss Plaintiff Harris, Granting Plaintiffs Nancy Coe and Patricia Noe Leave to Intervene, and Denying Plaintiffs' Motion for Temporary Restraining Order, Filed February 14, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 72-1842-CIV-JE

PAULA POE, et al., *Plaintiffs*,

v.

RICHARD E. GERSTEIN, etc., et al., *Defendants*.

ORDER

THIS CAUSE is before this Three-Judge Court on the plaintiffs' motion for rehearing (of the Court's Order of December 28, 1972, which dismissed plaintiffs Paula Poe and Rita Roe and denied plaintiffs' December 18, 1972, motion for temporary injunction) and summary judgment; Nancy Coe and Patricia Noe's application for leave to intervene as plaintiffs; and plaintiffs' motion for temporary restraining order and preliminary injunction.

In its Order of December 28, 1972, this Court reserved ruling upon defendants' motion to dismiss and to strike as directed toward the Complaint of the plaintiffs Pamela Harris, Dr. Lynn P. Carmichael, Dr. William Shore, and Dr. Richard Herman. Therefore, defendants' motion is considered to be before the Court at this time.

The Court has considered the motions, the memoranda and the record in this cause. It is therefore,

ORDERED and ADJUDGED that:

1. Plaintiffs' motion for rehearing and summary judgment is denied.

2. Defendant's motion to dismiss and to strike is denied as to the Complaint of the plaintiffs Dr. Lynn P. Carmichael, Dr. William Shore, and Dr. Richard Herman. *Doe* v. *Bolton*, 41 U.S.L.W. 4233 (U.S., No. 70-40, January 22, 1973). Defendants' motion to dismiss is granted as to the Complaint of plaintiff Pamela Harris.

3. Nancy Coe and Patricia Noe's application for leave to intervene as plaintiffs is granted.

4. Plaintiffs' motion for temporary restraining order is denied.

5. Hearing on plaintiffs' motion for preliminary injunction shall be held at 9:00 A.M. on March 13, 1973. Pursuant to the provisions of Rule 65(a)(2), Fed.R.Civ. Proc., trial of this cause on the merits shall be advanced and consolidated with the hearing on plaintiffs' motion for preliminary injunction. Plaintiffs shall have ten (10) days from the date of this Order in which to file their brief on the question of whether an injunction should issue. Defendants shall have ten (10) days after the filing of plaintiffs' brief in which to file their reply brief.

Done and Ordered at Miami, in the Southern District of Florida this 14th day of February, 1973.

/s/ David W. Dyer
United States Circuit Judge

/s/ W. O. Mehrtens
United States District Judge

I concur in all the above rulings save one. In my judgment, the motion to dismiss the complaint of Pamela Harris should be denied.

/s/ Joe Eaton
United States District Judge

cc: J. Robert Olian, Esq.
Roy Lucas, Esq.
Joseph P. Farina, Esq.

Order of the United States District Court, Dismissing Plaintiffs Paula Poe and Rita Roe, and Denying Plaintiffs' December 18, 1972, oMtion for Preliminary Injunction, Filed January 2, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 72-1842-CIV-JE

ORDER

THIS CAUSE came on before this Three-Judge Court on the Defendants' motion to dismiss and to strike. Hearing was held on December 21, 1972. At that time, counsel for the plaintiffs stated in open court that the plaintiffs Paula Poe and Rita Roe were no longer pregnant. Counsel for the plaintiffs also moved, ore tenus, that the Court consider the plaintiffs' December 18, 1972 motion for temporary injunction at the December 21, 1972 hearing.

The Court has considered the defendants' motion to dismiss and to strike; the plaintiffs' December 18, 1972 motion for temporary injunction; the memoranda; and the oral arguments of counsel. It is therefore,

ORDERED and ADJUDGED that this cause is dismissed as to the plaintiffs Paula Poe and Rita Roe. Ruling is reserved on the defendants' motion to dismiss and to strike as directed toward the complaint of the plaintiffs Pamela Harris; Dr. Lynn P. Carmichael; Dr. William Shore; and Dr. Richard Herman. It is further

ORDERED and ADJUDGED that the plaintiffs' December 18, 1972 motion for temporary injunction is denied.

Done and Ordered at Miami, in the Southern District of Florida this 28 day of December, 1972.

/s/ David W. Dyer
United States Circuit Judge

/s/ W. O. Mehrtens
United States District Judge

/s/ Joe Eaton
United States District Judge

cc: Attorney General of the State of Florida
Roy Lucas
Joseph P. Farina

Order of the United States District Court, Denying Petition to Intervene and for Appointment of Guardian Ad Litem. Filed December 8, 1972

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 72-1842-Civ-JE

Order

Before this Three-Judge Court is Petitioners' Dr. Maxine Moody Rowland, Sue Ann Kunberger, Beverly Martin and Eileen Murphy Brake, Petition to Intervene and for Appointment of Guardian Ad Litem in this cause.

The Court has considered the Petition and the memoranda. Upon consideration by the Court, it is

Ordered and Adjudged that:

1. The Petition to Intervene and for Appointment of Guardian Ad Litem is denied.

2. The Court will recognize an Amicus Curiae brief filed by Petitioners provided such brief is filed no less than ten days prior to the hearing on any application for inter-

locutory injunction or to any final hearing as may be set in this cause.

DONE and ORDERED at Miami, Southern District of Florida, this 6th day of December, 1972.

/s/ DAVID W. DYER
United States Circuit Judge

/s/ W. O. MEHRTENS
United States District Judge

/s/ JOE EATON
United States District Judge

cc: Roy Lucas, Esq.
Joseph P. Farina, Esq.
J. Robert Olian, Esq.
Robert M. Brake, James Kync, and Roderick Knott

Memorandum of United States District Court to Court of Appeals Requesting Chief Judge to Designate a Three-Judge Court, Filed November 22, 1972

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 72-1842-CIV-JE

To: Honorable John R. Brown, Chief Judge of the United States Circuit Court of Appeals for the Fifth Circuit:

The Complaint in the above styled action includes a prayer for convening of a three-judge court in accordance with the provisions of 28 U.S.C. § 2284. The Complaint seeks declaratory judgment and injunctive relief against enforcement Chapter 72-196, Sections 3(1) and 3(2), [1972] Fla.Stat.Ann., Sess. Laws 381, and the State of Florida Department of Health and Rehabilitative Services Rule 10D-0.05, which has state-wide impact. The suit is brought against a state officer. Chapter 72-196 §§ 3(1)

and 3(2) require that a physician obtain under certain circumstances either (1) the written consent of the pregnant woman's husband or (2) the written consent of a parent, custodian, or legal guardian, prior to terminating a pregnancy. Plaintiffs challenge these statutes on the grounds that they violate the rights of women and minors under the First and Ninth Amendments and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. State of Florida Department of Health and Rehabilitative Services Rule 10D-0.05 prohibits advertising by facilities approved to perform abortions and is challenged on the ground that it violates the rights guaranteed by the First and Fourteenth Amendments to the United States Constitution.

It appears this cause requires hearing and determination by a three-judge court in accordance with 22 U.S.C. § 2281.

Therefore, pursuant to 28 U.S.C. § 2284, you are hereby requested to designate such a three-judge court in accordance with § 2284(1) to hear and determine the above styled cause.

Dated at Miami, Southern District of Florida this 22nd day of November, 1972.

/s/ Joe Eaton
United States District Judge

cc: Roy Lucas, Esq.
Joseph P. Farina, Esq.
J. Robert Olian, Esq.

Order of the United States District Court, Denying Plaintiffs' Application for Temporary Restraining Order, Filed November 21, 1972

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 72-1842-CIV-JE

ORDER

THIS CAUSE came before the Court upon the plaintiffs' application for a temporary restraining order. Hearing was held on November 17, 1972. The Court has considered argument of counsel and memoranda filed by counsel for the parties.

In the application for temporary restraining order plaintiffs list two affirmative grounds for the relief they presently seek. They say:

> "Plaintiffs and their classes have a substantial probability of success on the merits, . . ." and
>
> "A temporary restraining order is necessary to protect the health of Paula Poe and Rita Roe from the threat of spouse and parental veto, respectively, against which Plaintiffs have no recourse other than equitable relief."

During the past three years, challenges similar to the one in the present case have been made against state abortion statutes in at least nine federal district courts in the nation. Although the individual statutes differed in their terms, the basic thrust of each challenge was that the state statute violated a pregnant woman's federal constitutional right to decide whether or not to bear a child.[1]

[1] In the present case, these plaintiffs are challenging the provisions of the Florida abortion statute which require a pregnant woman in certain situations to obtain the consent of her husband or one of her parents. Nevertheless, the constitutional challenge basically is that these statutory provisions are an impermissible interference with a pregnant woman's fundamental right to control her own body.

There has been a split of opinion among the three-judge district courts which have considered the basic question. Plaintiffs' position seems to have been rejected in *Corkey* v. *Edwards*, 322 F.Supp 1248 (W.D.N.C. 1971); *Rosen* v. *La.St.Bd. of Med.Ex.*, 318 F.Supp. 1217 (E.D.La. 1970); and *Steinberg* v. *Brown*, 321 F.Supp. 741 (W.D.Ohio 1970). By contrast, plaintiffs' position seems to have been accepted in *Roe* v. *Wade*, 314 F.Supp. 1217 (N.D.Texas 1970); *Doe* v. *Bolton*, 319 F.Supp. 1048 (N.D.Ga. 1970); *Doe* v. *Scott*, 321 F.Supp. 1385 (N.D.Ill. 1971); *Poe* v. *Menghini*, 339 F.Supp. 986 (D.Kan. 1972); and *Babbitz* v. *McCann*, 310 F.Supp. 293 (E.D. Wisc. 1970).

Plaintiffs at bar place great reliance upon the case of *Kennan* v. *Nichol*, 326 F.Supp. 613 (W.D.Wisc. 1971). Judge Doyle's entry of a temporary restraining order in that case was predicated on circumstances very different from those now before this Court. When Judge Doyle concluded that plaintiffs in *Kennan* v. *Nichol*, *supra*, enjoyed a "reasonably good chance" for ultimate success on the merits, he did so in view of the fact that the three judge panel in *Babbitz* v. *McCann*, *supra*, had already ruled on the constitutionality of the Wisconsin abortion statute. Because of the limited number of federal judges in Wisconsin, the unanimous decision in *Babbitz* served as a clear guide for Judge Doyle as to the plaintiffs' ultimate success on the merits.

Our research and inquiry into the files of the federal courts in Wisconsin have disclosed that *Nichol* v. *Kennan*, 404 U.S. 1055 (1972), a memorandum opinion of affirmance cited by plaintiffs was not addressed to the merits of a final judgment nor to a permanent injunction entered by a three-judge court.

Furthermore, several of the final three-judge court decisions cited in this order are before the Supreme Court of

the United States. Oral argument has been heard on at least two of the appeals.

Considering the present state of the law, it cannot now be reasonably predicted whether or not plaintiffs have a substantial probability of success in this litigation.

The immediate relief plaintiffs seek is a *temporary* restraining order. They seek the right to obtain an abortion in Florida within the next few days notwithstanding certain provisions of the Florida Statutes.

The Congress, in its passage of 28 U.S.C. § 2284, has authorized the entry of temporary restraining orders in limited circumstances. The prerequisite to the granting of a temporary restraining order is a showing that irreparable injury will result if the temporary restraining order is not entered. Irreparable injury is that injury which is certain and great. Irreparable injury within the meaning of that term in the statute has not been shown .

Furthermore, three-judge courts are constituted in a matter of days. It has not been shown that great injury will certainly result to plaintiffs Paula Poe and Rita Roe within that time between now and a hearing by a three-judge court on plaintiffs Paula Poe and Rita Roe's application for interlocutory injunction.

Therefore, it is

ORDERED and ADJUDGED that plaintiffs' application for temporary restraining order is hereby denied.

DONE and ORDERED at Miami, Southern District of Florida, this 21st day of November, 1972.

/s/ JOE EATON
United States District Judge

cc: Roy Lucas, Esq.
Joseph P. Farina, Esq.
J. Robert Olian, Esq.